United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

7-21

76-7208, 76-7211

To be argued by
JOSEPH ARTHUR COHEN

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

BENITO LOPEZ,

Plaintiff-Appellee,

—against—

EGAN OLDENDORF,

Defendant and Third Party Plaintiff-Appellant and Appellee,

—against—

INTERNATIONAL TERMINAL OPERATING CO., INC. and HOFFMAN RIGGING AND CRANE SERVICE, INC.,

Third Party Defendants-Appellants and Appellees.

BENITO LOPEZ,

Plaintiff-Appellee,

—against—

EGAN OLDENDORF and HOFFMAN RIGGING & CRANE SERVICE, INC.,

Defendants-Appellants and Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF THIRD PARTY DEFENDANT-APPELLANT, INTERNATIONAL TERMINAL OPERATING CO., INC.

ALEXANDER, ASH, SCHWARTZ & COHEN
Attorneys for Third Party Defendant-Appellant, International Terminal Operating Co., Inc.
801 Second Avenue
New York, N.Y. 10017
889-0410

SIDNEY A. SCHWARTZ
JOSEPH ARTHUR COHEN
Of Counsel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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The Issues on Appeal

By this appeal the third party defendant-appellant, INTERNATIONAL TERMINAL OPERATING CO., INC. (hereinafter ITO) presents the following issues for review by this Court:

1. The plaintiff, an injured longshoreman who was in the employ of ITO, recovered judgment from EGAN OLDENDORF (hereinafter SHIPOWNER) solely on the basis of that SHIPOWNER's negligence. Notwithstanding that the SHIPOWNER's liability was based solely upon its own negligence, the Court below invoked an implied warranty of workmanlike service from ITO so as to require it to indemnify such negligent SHIPOWNER merely because the plaintiff had been found 15% contributorily negligent. We submit that under decided law an implied warranty of workmanlike service is not invoked to benefit a shipowner liable solely for its own negligence.

2. The plaintiff also obtained judgment against HOFFMAN RIGGING AND CRANE SERVICE, INC. (hereinafter HOFFMAN) for its negligence in operating a crane that was discharging cargo at the time of the accident. The Court awarded HOFFMAN 50% contribution from ITO notwithstanding that HOFFMAN had made no such claim against ITO in that action, and notwithstanding that the law quite clearly holds that an employer, such as ITO, paying compensation under the Longshoremen's and Harbor Workers' Compensation Act is not suable for contribution.

3. The only finding of fault on the part of ITO by the Court below was that it was vicariously responsible

for the plaintiff's 15% contributory negligence. The Court also found the accident was caused by the primary negligence of HOFFMAN in the operation of its crane. Nonetheless, the Court dismissed ITO's cross claim against HOFFMAN for indemnity and contribution, and we submit that such dismissal was error.

The Nature of the Case

This is an action brought by a longshoreman, BENITO LOPEZ, to recover damages for personal injuries sustained by him on October 21, 1968 while working in the #1 hatch of the M/V JOBST OLDENDORF, a vessel owned by the defendant and third party plaintiff, EGAN OLDENDORF. LOPEZ made claim against OLDENDORF for both unseaworthiness and negligence.

OLDENDORF in turn impleaded both ITO (the stevedore employer of LOPEZ) and HOFFMAN RIGGING & CRANE SERVICE, INC., the owner and operator of the shoreside crane that was actually hoisting and dragging the cargo of steel beams being discharged at the time of the accident; and it sought indemnity from both of them.

HOFFMAN and ITO each cross claimed against the other seeking both indemnity and contribution.

During the course of the trial LOPEZ was permitted to amend his complaint so as to sue HOFFMAN directly for its negligence in causing the accident.

The Course of Proceedings and Disposition In the Court Below

The action by LOPEZ against OLDENDORF was tried to a jury. By agreement between counsel (15a)* all claims and issues between OLDENDORF, ITO and HOFFMAN were tried solely to the Court. The action by LOPEZ against HOFFMAN was also tried to the Court. Counsel for all parties participated in the jury trial of the LOPEZ action against OLDENDORF.

In connection with LOPEZ' action against OLDENDORF, the jury returned a special verdict (218a-220a) holding as follows:

1. That LOPEZ failed to establish his claim of unseaworthiness against OLDENDORF.
2. That LOPEZ did establish his claim of negligence against OLDENDORF.
3. That LOPEZ' total damages amount to $365,000.
4. That LOPEZ was 15% contributorily negligent.

Deducting LOPEZ' 15% contributory negligence from his total damages left him with a recovery against OLDENDORF in the amount of $310,250 and judgment for such amount was entered (311a-313a).

Solely on account of the jury finding that LOPEZ had been 15% contributorily negligent in failing to take shelter as the draft was being discharged, the Court held that ITO had thereby breached a warranty of workmanlike service to OLDENDORF and was obligated to indemnify OLDENDORF (230a). By reason of the undisputed and,

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* Unless otherwise indicated, all references are to the Joint Appendix.

indeed, admitted proof that HOFFMAN had caused the accident by topping the boom of its crane without receiving a signal to do so, the Court held that HOFFMAN was negligent and was also obligated to indemnify OLDENDORF. That same negligence on the part of HOFFMAN entitled LOPEZ to recover directly against HOFFMAN on his negligence action against HOFFMAN (300a), and the judgment entered awarded plaintiff a recovery of $310,250 against OLDENDORF and HOFFMAN, jointly and severally (312a).

The Court then dismissed ITO's cross claim against HOFFMAN for indemnity or contribution (309a).

The Court did, however, grant HOFFMAN 50% recovery from ITO in the event that HOFFMAN paid the judgment of $310,250 obtained against it by LOPEZ, *notwithstanding the fact that in such direct action by LOPEZ against HOFFMAN there had been no claim whatever asserted by HOFFMAN against ITO.*

Statement of Relevant Facts

The accident forming the basis of this lawsuit occurred at approximately 8:17 A.M. on October 21, 1968 in the #1 hold of the M/V JOBST OLDENDORF where the work taking place was the discharge of a cargo of steel beams (17a-18a). A shoreside crane owned and operated by HOFFMAN was being used to discharge the steel beams rather than the vessel's equipment (33a-34a). The vessel was tied up with her portside inshore and her starboard side offshore (26a).

The HOFFMAN crane had controls which permitted its operator to move the boom either up or down or from side to side (73a). It also had controls to permit the

HOFFMAN crane operator to raise and lower the cargo hook while keeping the boom stationary (74a).

This mobile crane was driven by HOFFMAN onto the pier alongside the hatch of the vessel (76a), and the boom was spotted so that the cargo hook would be squarely in plumb over the draft to be hoisted (77a-78a). From where he was sitting in the cab of the crane, the HOFFMAN crane operator could not see to the bottom of the hold where the cargo was located and the ITO signalman, GOMEZ, was in effect acting as his eyes (49a, 78a).

The accident occurred with the discharge of the very first draft (51a). That draft was to be picked up on the offshore side of the vessel, and the signalman positioned himself on the inshore deck coaming so that he would have an unobstructed view diagonally down into the lower hold offshore side (79a). The signalman was in a position where he could see the draft that was picked up and where he could be seen by the HOFFMAN crane operator (80a).

By topping or lowering the boom is meant physically moving the same in an up or down position (80a-81a). The signals for raising and lowering the boom itself are different from the signals given to raise or lower the cargo hook with the boom kept stationary (81a-82a).

Unless otherwise signaled, the crane operator is to keep the boom stationary while raising or lowering the cargo hook to which, of course, the draft is attached (82a-83a).

The plaintiff and three other longshoremen put chains under and around the beams in the first draft and attached those chains onto the cargo hook of the HOFFMAN crane (83a-85a). When the draft of beams was so hooked up, the signalman was then to give signals to the crane operator (87a).

The signalman gave a signal to the HOFFMAN crane operator to leave the boom of the crane in place and to just hoist the cable with the cargo hook to which the draft was attached. He did not give him a signal to raise or otherwise move the boom of the crane (90a). The HOFFMAN crane operator, however, topped the boom of the crane by raising it higher to the vertical even though that was not what was signaled for (91a-92a).

That unsignaled for raising of the boom by the HOFFMAN crane operator caused the draft to drag from the offshore side over to the inshore side where it knocked into and dislodged the beam that toppled onto plaintiff's leg (57a, 92a-93a).

HOFFMAN's crane operator, HOGAN, admitted that he was unable to see into the #1 hold from his position in the crane cab (245a). He further admitted that the signal he got from the signalman was to raise the draft (246a-247a). The next signal he received was to stop (248a). He admitted on cross examination that after receiving the signal to merely raise the draft, he also raised the head of the boom without receiving any signal to do that (250a-252a, 256a-257a). He further admitted that the effect of his raising the boom of the crane would be to cause the draft of cargo to move across the hatch from offshore to inshore (263a, 264a).

The Court found that the raising of the boom by HOFFMAN, without any signal to do so, "caused the sliding motion inshore of the draft which hit one of the I-beams, which in turn fell on the plaintiff and caused the accident", and constituted negligence on the part of HOFFMAN to the plaintiff (300a-302a).

POINT I

It Was Error to Grant the Shipowner Indemnity Against ITO, Because a Negligent Shipowner Is Not Entitled to an Implied Warranty of Workmanlike Service.

It should be noted at the outset that if, as urged by the SHIPOWNER on its appeal, the record is without proof of negligence to support the jury verdict against it, then this part of this appeal becomes academic. For, if the SHIPOWNER succeeds on its appeal and obtains dismissal of the plaintiff's negligence action against it, then the SHIPOWNER's indemnity actions are mooted. However, in the event that this Court should find that the record does contain adequate proof of SHIPOWNER's negligence to support the verdict against it, then the SHIPOWNER's entitlement to indemnity is a very real issue to which we now address ourselves.

As the record discloses (230a), Judge Wyatt granted the SHIPOWNER indemnity solely on the basis of the jury verdict that LOPEZ had been 15% contributorily negligent. In so doing, Judge Wyatt was following the established law of this Circuit that holds a longshoreman's contributory negligence constitutes, as a matter of law, a breach of his employer's implied warranty of workmanlike service, see e.g., *Rodriguez* v. *Olaf Pedersen's Rederi A/S*, 527 F. 2d 1282, and the cases cited on P. 1284 thereof. *However, the Court below erred by overlooking the equally established law of this and other Circuits that an indemnity warranty is not implied to benefit a shipowner liable solely for its own negligence;* and in failing to appreciate that in *Rodriguez*, the vessel owner was also liable for unseaworthiness.

An implied warranty of workmanlike service will be judicially invoked for equitable reasons. It will be invoked to benefit a shipowner who is rendered vicariously liable to a longshoreman by reason of its own "no fault" obligations under the warranty of seaworthiness. It is that liability for unseaworthiness that in turn brings into being the implied warranty of workmanlike service. As stated by this Court in *DeGioia* v. *United States Lines Company*, 304 F. 2d 421, 425 (2 Cir. 1962):

> "The primary source of the shipowner's right to indemnity, as a practical matter, is his nondelegable duty to provide a seaworthy ship, by virtue of which he may be held vicariously liable for injuries caused by hazards which the longshoremen either created or had the primary responsibility or opportunity to eliminate or avoid. * * * *The scope of the stevedore's warranty of workmanlike performance is to be measured by the relationship which brings it into being.* Since the shipowner here was held liable for injuries the jury found were the foreseeable result of the stevedores' failure to perform in a workmanlike fashion, it may recover indemnification * * *." (Italics added.)

Manifestly, the equitable considerations that compel a Court to imply a warranty of workmanlike service to benefit a shipowner held liable for unseaworthiness do not exist where a shipowner is held liable solely for its own negligence. And, as one would expect, the Courts have almost uniformly refused to imply a warranty of workmanlike service to benefit a shipowner liable solely for its own negligence. As this Court explained in *Schwartz* v. *Compagnie Generale Transatlantique*, 405 F. 2d 270, 276 (2 Cir. 1968):

"The Courts have recognized that the doctrine of seaworthiness, which creates liability without fault, places an extremely heavy burden of liability on the shipowner. *Indemnity is permitted the shipowner because his reliance upon an independent contractor frequently results in the shipowner's vicarious liability for injuries without fault.* See DeGioia v. United States Lines Company, 304 F. 2d 421 (2nd Cir. 1962).

Since any equitable considerations underlying the decision of courts to require indemnity by applying the implied warranty of workmanlike service are ultimately derived from a shipowner's liabilities under the seaworthiness guarantee, *where there is no such possible liability,* as in this case, *there can be no requirement of indemnity under the warranty doctrine.*

The fact that a shipowner may be found liable to plaintiff due to the ship's negligence is hardly an injustice per se requiring this court to invoke an artificial equitable doctrine of indemnity. The shipowner is obligated to pay plaintiff only if it was negligent and if, as a proximate result thereof, Schwartz suffered injuries; and since the doctrine of comparative negligence seems to apply, the French Line does not pay for the injuries insofar as they may have been caused by plaintiff's own negligence." (Italics added.)

As the shipowner's liability in the *Schwartz* case was based solely on its own negligence (as is true of the SHIPOWNER's liability in the instant case) the artificial doctrine of implied indemnity was not invoked (and should not have been invoked in the instant case). Indeed, this Court held in the *Schwartz* case that the reduction of that shipowner's liability by the extent of plaintiff's contributory negligence amply covered and equitably terminated the matter (and that should also have been the result in the instant case).

The unavailability of an implied warranty of indemnity to a shipowner whose liability is not based upon unseaworthiness was recognized by Judge Weinfeld in *Jones* v. *United States*, 304 F. Supp. 94, 100, aff'd. 421 F. 2d 835 (2 Cir. 1970) who stated at Footnote 20:

> "Also it is noted that our Court of Appeals only recently ruled that this theory of indemnity is unavailable where the underlying claim is not based on the doctrine of unseaworthiness. Schwartz v. Compagnie Generale Transatlantique, 405 F. 2d 270, 275-276 (2d Cir. 1968)."

In *Fairmont Shipping Corp.* v. *Chevron International Oil Company, Inc.*, 511 F. 2d 1252 (2 Cir. 1975), this Court once again considered when an implied warranty of indemnity would be applied. As indicated on Page 1258 of 511 F. 2d, the "most significant aspect" requiring invocation of such an equitable doctrine is:

> "* * * the fact that the absolute duty of seaworthiness requires shipowners, regardless of their fault, to pay for accidents caused by stevedores."

This Court goes on to indicate that where a shipowner's liability to a longshoreman is based solely on its own negligence, the implied warranty of workmanlike service is not an available relief. It is only where the shipowner has been exposed to liability without fault on its part that a compensating warranty of workmanlike service is implied by the Court for equitable reasons. As the verdict in the case at Bar indicates, the SHIPOWNER's liability is for its own negligence, and hence it was not entitled to the benefit of an implied warranty of indemnity and it should not have been granted recovery against ITO.

The law in the 9th Circuit is in accord that it is a shipowner's liability without fault that brings into existence

the implied warranty to indemnify. As stated in *Davis* v. *Chas. Kurz & Co., Inc.*, 483 F. 2d 184, 187 (9 Cir. 1973):

> "The rationale underlying Ryan and the later cases is that *when a shipowner owes a duty of seaworthiness to an injured party (and consequently its liability is not dependent on a finding of its fault) a corresponding duty of indemnity should devolve upon a stevedore whose failure to perform with reasonable safety caused the injury.* See Italia Societa v. Oregon Stevedoring Co., Inc., supra, 376 U.S. at 324, 84 S. Ct. 748; Schwartz v. Compagnie Generale Transatlantique, 2 Cir., 1968, 405 F. 2d 270; Loffland Bros. Co. v. Roberts, 5 Cir., 1967, 386 F. 2d 540; DeGioia v. United States Lines Co., 2 Cir. 1962, 304 F. 2d 421.
>
> Northwest argues that the existence of the warranty does not depend on a corresponding existence of a duty of seaworthiness. We think that it does." (Italics added.)

In *Centraal Stikstof Verkoopkanter N.V.* v. *Walsh Stevedoring Co.*, 380 F. 2d 583 (5 Cir. 1967), the 5th Circuit stated (p. 529):

> "The implied warranty established in Ryan is a product of the admiralty courts and a creature of admiralty law. It is tied closely to the duties and obligations which the admiralty law imposes on shipowners with respect to those employed by and who work on a ship."

The 5th Circuit thereafter denied all efforts to have the implied indemnity warranty extended to cases other than those in which a shipowner was liable for unseaworthiness, see *Loffland Bros. Company* v. *Roberts*, 386 F. 2d 540, 548-549 (5 Cir. 1967); *Hobart* v. *Sohio Petroleum Company*, 445 F. 2d 435 (5 Cir 1971); *Sandoval* v. *Mitsui*, 460

F. 2d 1163, 1168 (5 Cir. 1972). See, too, *Whisenant* v. *Brewster-Bartle Offshore Company,* 446 F. 2d 394, 403 (5 Cir. 1971) wherein the Court stated at Footnote 31:

> "In any application of the Ryan doctrine, it would appear that at least the following three elements must be present: (a) *a vessel must be found to be unseaworthy,* (b) the implied agreement or warranty of workmanlike performance must be breached, and (c) the injured party must have been a seaman of some type." (Italics added.)

In *Liberty Mutual Insurance Company* v. *Fruehauf Corporation,* 472 F. 2d 69 (6 Cir. 1972), the 6th Circuit also joined in the position that an implied warranty of indemnity would be invoked only where a shipowner was liable because of unseaworthiness. The rationale there, as in the other cases cited, was that the implied warranty of indemnity was designed "to help mitigate the harshness of the seaworthiness doctrine where the stevedoring firm was to blame for the injury to its employee."

As the cases cited above indicate, there would seem to be a unanimity of judicial opinion that a negligent shipowner is not entitled to be equitably relieved from the consequences of his own negligence by the judicial invocation of an implied warranty of indemnity. Research does, however, disclose one case dealing with that subject which reaches a different conclusion, but which we believe to be factually distinguishable. In *Henry* v. *A/S Ocean,* 512 F. 2d 401 (2 Cir. 1975) a shipowner found liable in negligence and not for unseaworthiness was given the benefit of such an implied warranty so as to obtain indemnity from the stevedore. It should be noted, however, that the shipowner's conduct in that case was quite passive whereas the stevedore's conduct was active and primary and con-

sisted of continuing the stevedoring operation knowing that a boom was improperly positioned and without waiting for the boom to be repositioned. That case did not involve a stevedore who was only vicariously at fault because of the imputed contributory negligence of a plaintiff longshoreman who failed to take a place of safety. In view of the facts of that case, the equities lay with the shipowner and the Court found that case factually distinguishable from the *Schwartz* case, *supra,* which it did not overrule.

Consideration of the underlying rationale for the judicial invocation of an implied warranty of indemnity shows that in accordance with the almost unanimous judicial thinking and writing on the subject the SHIPOWNER in the instant case is entitled to no such equitable relief. It was thus error for the Court below to enter judgment requiring ITO to indemnify the SHIPOWNER for the SHIPOWNER's own negligence merely because this plaintiff was found to be 15% contributorily negligent in failing to take a place of safety.

POINT II

It Was Error to Grant Hoffman Contribution From ITO.

Since the SHIPOWNER in the jury action and HOFFMAN in the non-jury action were each held liable to the plaintiff for negligence, the judgment entered herein in favor of the plaintiff (312a) is directly against both the SHIPOWNER and HOFFMAN, jointly and severally. Said judgment then provides (312a-313a):

> "ORDERED and ADJUDGED that the defendant HOFFMAN RIGGING & CRANE SERVICE, INC.,

> if it pays the judgment herein, recover of the third party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., the sum of $155,125.00 together with interest thereon and one half the sum to be taxed as costs in favor of the plaintiff, BENITO LOPEZ, against said defendant, * * * ".

It was error as a matter of law for the Court below to award HOFFMAN contribution from ITO.

It should be noted initially that in the plaintiff's direct non-jury action against HOFFMAN the pleadings consisted solely of an amended complaint (7a) and HOFFMAN's answer thereto (11a). *Examination of HOFFMAN's aforesaid answer shows that HOFFMAN made no claim against ITO for either contribution or anything else.* Nor did HOFFMAN in plaintiff's direct action against it, serve any other pleadings making claim against ITO for contribution or anything else. Thus, the Court below granted HOFFMAN a recovery for a claim not made.

Not only was no such claim for contribution advanced in any pleading by HOFFMAN, but no such claim exists in law. As earlier indicated, plaintiff was a longshoreman in the employ of ITO which furnished him with the benefits required by the *Longshoremen's and Harbor Workers' Compensation Act,* 33 U.S.C. §§ 901 et seq. Accordingly, ITO is not subject to a claim for contribution, *Halcyon Lines* v. *Haenn Ship Ceiling and Refitting Corp.,* 342 U.S. 282 (1952), 72 S. Ct. 277.

An employer's immunity to a claim for contribution by reason of the Longshoremen's and Harbor Workers' Compensation Act was again recognized and reaffirmed in *Atlantic Coast Line Railroad Company* v. *Erie Lackawanna Railroad Company,* 406 U.S. 34 (1972), 92 S. Ct. 1550, affirming 442 F. 2d 694 (2 Cir. 1971).

When the same question was most recently considered in *Cooper Stevedoring Company, Inc.* v. *Fritz Kopke Inc.*, 417 U.S. 106 (1974), 94 S. Ct. 2174 the factors giving rise to the *Halcyon* decision were found to still have force, and the Supreme Court stated that the limitation-of-liability provisions of the *Longshoremen's and Harbor Workers' Compensation Act* protected the employer from a claim for contribution. As *Cooper Stevedoring, supra,* clearly indicates, although maritime law permits contribution between joint tortfeasors, an exception to that rule exists in favor of a compensation paying employer. It was clearly legal error for the Court below to award HOFFMAN 50% contribution from ITO, and that part of the judgment should be reversed.

Manifestly, if notwithstanding the foregoing, this Court should be of the view that HOFFMAN may obtain and is entitled to contribution from ITO herein, then such contribution must be in proportion to the relative degree of fault of both those parties, *United States* v. *Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), 95 S. Ct. 1708. A 50% contribution is not proportionate.

The so-called "fault" on the part of ITO is purely vicarious and stems from the jury finding that plaintiff was 15% contributorily negligent. The fault of HOFFMAN, on the other hand, is for the improper topping of the crane boom without signal to do so, which caused the draft to drag over the other cargo in the hatch and a beam therefrom to topple onto plaintiff's leg. In any apportionment of damages in relationship to fault, it would seem evident that ITO's share should not exceed 15%, since that was the entire amount of the plaintiff's negligence that was imputed to it. Accordingly, it was error for the Court below to award HOFFMAN a contribution of 50%.

POINT III

It Was Error for the Court to Dismiss ITO's Cross Claims Against Hoffman for Indemnity and Contribution.

In its answer to the third party complaint of the SHIPOWNER (Record on Appeal, Document 10), ITO cross claimed against HOFFMAN for both indemnity and contribution. Without giving either legal reasons or factual findings, the Court below dismissed those cross claims. It was error for it to do so.

a. The claim for indemnity.

ITO's cross claim against HOFFMAN for indemnity was predicated upon the doctrine, well established in maritime law, that one who is only passively or vicariously liable is entitled to recover full indemnity from an active or affirmative tortfeasor. The legal history of that doctrine and its existence in maritime law is fully set forth in *Tri-State Oil Tool Industries Inc.* v. *Delta Marine Drilling Co.*, 410 F. 2d 178 (5 Cir. 1969). Such non-contractual type of indemnity:

> "* * * is only available in favor of one who is passively, vicariously or secondarily at fault against the party whose active or primary negligence causes the injury or damage upon which injury is predicated."

Acme Boat Rentals Inc. v. *J. Ray McDermott & Company*, 424 F. 2d 393, 395 (5 Cir. 1970).

In *Constance* v. *Johnston Drilling Company*, 422 F. 2d 369 (5 Cir. 1970) plaintiff's Jones Act employer, liable for a passive violation of its Jones Act duty, was given full indemnity from the party whose negligence was active

and affirmative. So, in the case at Bar, should ITO (vicariously liable to SHIPOWNER because of plaintiff's contributory negligence) be granted full indemnity from HOFFMAN who was the principal and primary wrongdoer herein.

Since the record shows the predicate of ITO's liability to be the imputed 15% contributory negligence of plaintiff (230a), and since the record shows the Court below found HOFFMAN negligent in causing the accident by the manner in which it operated its crane, it is respectfully submitted that ITO was entitled to indemnity from HOFFMAN as a matter of law and that in view of the existing record this Court is able to grant ITO that relief.

b. The claim for contribution.

Even though contribution cannot be obtained *against* ITO as we discussed earlier under Point II, *supra,* because it is protected from such claim by the *Longshoremen's and Harbor Workers' Compensation Act,* that Act does not operate to exclude any right that ITO might have against others, see *Federal Marine Terminals Inc.* v. *Burnside Shipping Co. Ltd.,* 394 U.S. 404, 412 (1969), 89 S. Ct. 1144, 1149. The Act was in no way intended to curtail any of the rights that a stevedoring contractor would otherwise have under the general maritime law.

Accordingly, if liable herein to the SHIPOWNER by reason of the imputation to it of plaintiff's 15% contributory negligence, then ITO is entitled to contribution from HOFFMAN in proportion to their respective degrees of fault, *United States* v. *Reliable Transfer Co., Inc.,* 421 U.S. 397 (1975), 95 S. Ct. 1708.

As the amount of the fault imputed to ITO could not exceed 15%, and as the quality of that fault was only

vicarious, it follows that ITO should recover contribution against the primary and affirmative wrongdoer, HOFFMAN, so that the entire recovery over by the SHIPOWNER against ITO and HOFFMAN is apportioned not more than 15% to ITO and not less than 85% to HOFFMAN. It was error for the Court below to dismiss ITO's claim for contribution against HOFFMAN.

CONCLUSION

(1) Plaintiff has obtained a judgment, jointly and severally against both the SHIPOWNER and HOFFMAN. If on SHIPOWNER's appeal that judgment is reversed as to it and the action against it is dismissed, then plaintiff has a judgment solely against HOFFMAN.

In plaintiff's direct action against HOFFMAN, it did not make claim against ITO for contribution, and it cannot legally make such a claim. Accordingly, the judgment granting HOFFMAN 50% contribution from ITO must be reversed. The end result of that situation would be that HOFFMAN is solely liable for payment of the plaintiff's recovery. As the plaintiff's recovery has already been reduced by plaintiff's 15% contributory negligence, HOFFMAN would really be responding solely for the amount of its own fault. Such a disposition of this matter would be completely fair and equitable and should commend itself to this Court which in applying the law of Admiralty is in effect acting as a court of equity.

(2) If this Court should deny the SHIPOWNER's appeal and let the judgment against it stand, consideration must then be given both to the SHIPOWNER's indemnity action against ITO and HOFFMAN, and to ITO's cross claims against HOFFMAN. If the judgment against the

SHIPOWNER based upon the verdict of its negligence is not reversed and dismissed, then SHIPOWNER is not entitled to recover indemnity from ITO. There is no equitable reason whatever for a Court to invoke an implied warranty of workmanlike service to benefit a shipowner liable for its own negligence. As this SHIPOWNER was liable solely for its own negligence, no implied warranty of indemnity from ITO is to be invoked. Without such an implied warranty, ITO is not cast into any liability by reason of plaintiff's contributory negligence.

In this situation, both the SHIPOWNER and HOFFMAN are left ultimately liable for the plaintiff's recovery which has already been reduced to the extent of plaintiff's contributing fault. Whether such liability should be divided equally between them, or whether it should be apportioned on contribution principles so that HOFFMAN pays more than the SHIPOWNER, is a matter on which we express no opinion. However, for two negligent parties such as SHIPOWNER and HOFFMAN to be required to pay in proportion to their respective fault the plaintiff's reduced recovery would also be an equitable result which should commend itself to this Court if it denies SHIPOWNER's appeal.

(3) If both the SHIPOWNER and HOFFMAN are liable to the plaintiff, and if the SHIPOWNER is then granted indemnity against both ITO and HOFFMAN, the judgment dismissing ITO's cross claims for indemnity or contribution from HOFFMAN is in error and should be reversed. Only vicariously liable for the imputed 15% contributory negligence of the plaintiff, ITO is entitled to full indemnity from the primary and affirmative tortfeasor, HOFFMAN. The end result of such situation would be that HOFFMAN is required to ultimately pay the plain-

tiff's reduced recovery, which is again a fair and equitable result herein.

If ITO is not granted indemnity from HOFFMAN, then the recovery over by the SHIPOWNER against both ITO and HOFFMAN should be apportioned so that ITO is required to pay no more than the 15% contributory negligence imputed to it, and HOFFMAN is required to pay at least 85%. This would result in making ITO an ultimate payor of up to 15% of plaintiff's recovery and making HOFFMAN an ultimate payor of at least 85% of plaintiff's recovery. This is neither as fair nor as equitable a result as the others posited above, but is certainly preferable to the present situation whereby ITO is required to pay a full 50% of the recovery.

Respectfully submitted,

ALEXANDER, ASH, SCHWARTZ & COHEN
Attorneys for International Terminal Operating Co., Inc.
801 Second Avenue
New York, New York 10017

SIDNEY A. SCHWARTZ
JOSEPH ARTHUR COHEN
Of Counsel

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Brief is admitted this
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Robert Klonsky
ATTORNEYS FOR Appellee, Benito Lopez

Cullman & Cullman
by Victor S. Kleinmann
Attorneys for Appellant-Appellee, Egan Oldendorf

Hill, Betts & Nash
by Robert L. Blanc
Attorneys for Appellant-Appellee, Hoffman Rejsing, &c.

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